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No.

IN THE
Supreme Court of the United States
October Term, 1998

Margie J. Phelps,
Petitioner

vs.

Michael Barbara
Carla J. Stovall and
John Bork

ON PETITION FOR WRIT OF CERTIORARI TO THE TENTH CIRCUIT COURT OF APPEALS

PETITION FOR WRIT OF CERTIORARI

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Petitioner was found guilty of contempt in state court. As her sentence, petitioner was fined $500, ordered to pay half the costs of the contempt proceedings, removed from the underlying case as counsel and prohibited from practicing in the state judicial district until the fine and costs were paid. Immediately following the contempt finding, the state disciplinary administrator filed a disciplinary complaint against petitioner, and petitioner's employer, a state agency, proposed an unpaid suspension, both of which are pending. The judge who heard the contempt charge was also the accuser and alleged he was personally the victim. Petitioner sought his recusal, which was denied. On appeal, the Kansas Court of Appeals found it was improper for the judge to hear the matter, but upheld the contempt finding saying the judicial bias was harmless. After exhausting state remedies, petitioner sought relief through a habeas petition. The petition was dismissed on a finding that petitioner was not "in custody."

A. Is it a denial of equal protection to deny access to federal courts through habeas review for those persons whose constitutional rights have been violated, simply because they have not been imposed jail time, while those with jail time imposed are afforded full review of their constitutional issues?

B. Was it error for the federal courts to find that petitioner was not "in custody," given the significant restraints on her liberty, including her professional liberty?

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REFERENCE TO OFFICIAL REPORT OF OPINIONS

All of the opinions at issue here were unpublished, including state and federal court opinions.[1] The district court's order can be found at 1997 WL 756625 (D.Kan., 11/18/97).

CONCISE STATEMENT OF THE GROUNDS ON WHICH JURISDICTION OF THIS COURT IS INVOKED

A. Date of the entry of the judgment or decree sought to be reviewed: The Tenth Circuit Court of Appeals' opinion was issued October 7, 1998.

B. Date of any order respecting a rehearing: Petitioner filed a timely petition for rehearing with suggestions for rehearing en banc, which was denied by the Tenth Circuit without comment on November 6, 1998.

C. Statutory provisions conferring on this Court jurisdiction to review the judgment or decree in question by writ of certiorari: Rule 10(a), Rules of the Supreme Court of the United States, "a United States court of appeals has entered a decision in conflict with the decisions of another United States court of appeals on the same important matter; ... or has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power."

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The only parties to the proceeding at the lower court are reflected in the caption. Michael Barbara is the state court judge who heard the contempt charges. John Bork is the attorney general assigned by Judge Barbara to prosecute the contempt charges. Carla Stovall is the Kansas Attorney General.

CONSTITUTIONAL PROVISIONS INVOLVED IN THE CASE

Article III, Section 1: The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish . . . Section 2, Clause 1: The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, . . .

Article IV, Section 2, Clause 1: The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States.

Fifth Amendment to the United States Constitution, Section 4: .... No person shall . . . be deprived of life, liberty, or property, without due process of law.

Fourteenth Amendment to the United States Constitution, Section 1: .... No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 5: The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

WHERE THE CONSTITUTIONAL ISSUES WERE RAISED WITH THE STATE (LOWER) COURTS

Petitioner challenged Judge Barbara's ability to hear the contempt proceedings at the outset of the contempt hearing, in light of his allegation in the show cause order that he was personally the victim of contempt. Judge Barbara denied

petitioner's requests that he remove himself from hearing the matter.

Petitioner raised her constitutional right to an unbiased judge before the Kansas Court of Appeals. During the appeal, the State did not contend the judicial bias was harmless error, and instead claimed there was no bias and no impropriety in Judge Barbara hearing the matter. Therefore, the harmless error issue was not addressed before the Kansas Court of Appeals, in the initial briefs or arguments.

After the Kansas Court of Appeals agreed that Judge Barbara should not have heard the matter, but concluded it was harmless error for him to do so, petitioner raised the constitutional issue again with the Kansas Court of Appeals in a motion for rehearing, and with the Kansas Supreme Court in a petition for review. Both of those requests for review were denied without comment.

Petitioner raised the constitutional issue about judicial bias in her habeas petition. When the district court certified the jurisdiction issue for review by the Tenth Circuit, the constitutional issue regarding bias was also certified for review, and briefed by petitioner. The Tenth Circuit only addressed the "in custody" issue.

After the Tenth Circuit ruled that petitioner was not "in custody," petitioner raised an additional constitutional issue, equal protection, in a petition for rehearing with suggestions for rehearing en banc. That petition was denied without comment.

CONCISE STATEMENT OF THE CASE

Petitioner is counsel for Westboro Baptist Church in

Topeka, Kansas. Westboro Baptist Church is an Old School Baptist church engaged in anti-homosexual religious picketing. This highly controversial picketing focuses on the homosexual movement in America, as well as the role of various churches in that movement.

Westboro Baptist Church's activity has caused it to engage in public debate with many churches and religious leaders. The central message of Westboro Baptist Church's religious message is reflected in its webpage, "www.godhatesfags.com."

Petitioner represented Westboro Baptist Church in a lawsuit filed in state court in Topeka, Shawnee County, Kansas (where the church is located). The suit was filed on July 13, 1994, by St. David's Episcopal Church, and pertained to picketing and counter-picketing occurring between the two churches' members outside of St. David's church building. The case was assigned to Judge Barbara, a retired state court judge and professor at the local law school (Washburn University).

The year before the case was assigned to Judge Barbara, he and other law school professors included their names in a large ad run in the local paper which criticized Westboro Baptist Church's picketing and religious message. Other persons signing the petition included St. David's rector and attorney, and other members of that church. Concerns about Judge Barbara's ability to hear matters concerning the picketers, and in particular to hear the dispute between the two churches, were raised with Judge Barbara, but he declined to remove himself from cases involving the picketers, including the *St. David's* case.

Fred Phelps, Westboro Baptist Church's preacher, conducted a weekly radio sermon on a program called "Old School Baptist Hour." On August 14, 1994, as part of his sermon, Mr. Phelps briefly criticized Professor Michael Barbara for actions he believed were immoral. (The law school, and various of its

professors, were and are frequently the topic of preaching by Mr. Phelps, on and off the radio.)

On September 14, 1994, petitioner filed a motion asking Judge Barbara to remove himself from the *St. David's* case. During a closed hearing on September 20, 1994, petitioner marked a transcript which she prepared of the portion of the radio program critical of Professor Barbara, and showed it to Judge Barbara in support of the motion. Judge Barbara became angry, said that the content of the exhibit pertained to his "personal life," and directed petitioner to withdraw the exhibit or risk contempt. The exhibit was immediately withdrawn.

On September 27, 1994, Judge Barbara filed an order directing petitioner to show cause why she should not be found in contempt. The matter was scheduled to be heard by Judge Barbara. Before the contempt charges proceeded to an evidentiary hearing, petitioner asked Judge Barbara to remove himself because of his personal role as a victim which would necessarily bias him. Judge Barbara declined to remove himself, and proceeded with the hearing.

At the close of the hearing Judge Barbara found petitioner in contempt. The punishment imposed included a fine of $500, half the court costs of the contempt proceedings, removal of petitioner from the *St. David's v. Westboro Baptist Church* case, and an order prohibiting petitioner from practicing in the local judicial district (Third Judicial District) until she paid the fine and costs. Immediately following a news story reciting this finding and punishment, the Kansas Disciplinary Administrator initiated an ethical complaint against petitioner, and petitioner's employer, a state agency, proposed a one-week suspension of petitioner without pay. Both of these disciplinary matters are still pending.

Petitioner appealed the finding of contempt, raising various points of error. During the appeal, the State's position was that

Judge Barbara was not biased, and that it was proper for him to hear the contempt charge. The State never alleged that it was harmless error for Judge Barbara to hear the case. Also, the State never assumed a burden of demonstrating beyond a reasonable doubt that the outcome of the contempt proceedings would have been the same if not tried by a biased judge.

The Kansas Court of Appeals issued an order on January 17, 1997, holding that it was error for Judge Barbara to hear the contempt charges because he was personally the victim, based on this Court's opinion in *Mayberry v. Pennsylvania*, 400 U.S. 455, 27 L.Ed.2d 532, 91 S.Ct. 499 (1971). The court concluded, however, that it was harmless error for a biased judge to hear the contempt proceedings, stating: "Her conviction was overwhelmingly supported by the evidence, and the punishment imposed was very reasonable and well within the exercise of reasonable judicial discretion. Margie Phelps has failed to demonstrate prejudicial error."[2]

Petitioner filed a motion for rehearing with the Kansas Court of Appeals, which was denied without discussion on February 12, 1997. Petitioner filed a petition for review with the Kansas Supreme Court, which was also denied without discussion on March 19, 1997.

In her motion and petition, petitioner argued that as a

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[2] In *Tumey v. Ohio*, 273 U.S. 510, 535, 47 S.Ct. 437, 445, 71 L.Ed. 749 (1927), this Court rejected that same argument. There, the government argued that "the evidence shows clearly that the defendant was guilty and that he was only fined $100 which was the minimum amount, and therefore that he cannot complaint of a lack of due process, either in his conviction or in the amount of the judgment." This Court answered: "No matter what the evidence was against him, he had the right to have an impartial judge."

matter of law judicial bias is a fundamental and foundational error, and cannot be treated as harmless error, even if the record allegedly supports a finding of guilt. See *Edwards v. Balisok*, 520 U.S. 641, 117 S.Ct. 1584, 1588, 137 L.Ed.2d 906 (1997); *Arizona v. Fulminante*, 499 U.S. 279, 308, 111 S.Ct. 1246, 1264, 113 L.Ed.2d 302 (1991); *Tumey v. Ohio, supra*, 273 U.S. 510, 535, 47 S.Ct. 437, 445, 71 L.Ed. 749 (1927). This rule of law is long established, and is based on the fact that judicial bias is pervasive, ungettable, and presumed to impact the outcome. The "constitutional floor" established by the Due Process Clause clearly requires a judge with no actual bias against the defendant or interest in the outcome of a particular case. *Bracy v. Gramley*, 520 U.S. 899, 117 S.Ct. 1793, 1797, 138 L.Ed.2d 97 (1997).

The force of this rule is felt here, where it cannot be gainsaid that the bias of the judge who claimed personally to be the victim impacted the outcome of the proceedings. Particularly when a review of the record of the contempt proceedings reveals zero evidence to support Judge Barbara's conclusion that petitioner acted with a contemptuous motive.[3]

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It is important to note briefly the dilemma an attorney would have in a situation of this kind. The purpose of marking the exhibit was to support a motion to recuse the judge. There is a pernicious unfairness in charging an attorney with being motivated to "intimidate" the judge into getting off the case. The motion was made was petitioner's fear that the sermon by the preacher of the church she represented had so angered the judge that he would be unable to hear the matter fairly. Particularly in light of his history of involving himself in the religious debate in the community at which the church was center. The only thing that converted these proper and statutorily-prescribed acts by petitioner into alleged contempt was a motive which respondent Barbara superimposed over petitioner's actions. No evidence was offered at the hearing other than petitioner's testimony as to her motive, which was uncontroverted by the State. Nothing in her testimony disclosed any motive other than to

Once the Kansas Court of Appeals recognized Judge Barbara's bias, and the fact that he should have recused himself, the *only* constitutionally permissible outcome was reversal. "Although most constitutional errors have been held amenable to harmless-error analysis . . . **some will always invalidate the conviction**, [including trial by a biased judge]." *Sullivan v. Louisiana*, 508 U.S. 275, 279, 113 S.Ct. 2078, 2081, 124 L.Ed.2d 182 (1993); emphasis added.

Yet, even if the court had believed judicial bias could be harmless error, before finding that it was harmless in this case, the court was obligated to impose on the State a burden of showing that the outcome would have been the same. As the beneficiary of the error, the State should have assumed the burden of proving beyond a reasonable doubt that the error did not contribute to the outcome. *E.g., Satterwhite v. Texas*, 486 U.S. 249, 108 S.Ct. 1792, 1797, 100 L.Ed.2d 284 (1988); *Chapman v. California*, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967). Instead, without any notice, the court imposed on petitioner the burden of showing prejudice had occurred. In every particular, this ruling violated the constitutional principles announced by this Court.

This error by the Kansas Court of Appeals has utterly

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protect a client in difficult circumstances.

Mr. Phelps has preached the same unvarnished message for over 51 years. It is not likely he will alter his course because of yet another round of litigation that flows from this ministry. The church believes her members' speech is lawful and protected, no matter how unpopular. If they were going to become tongue-tied because of litigation, they may as well stop the ministry now. This is the context in which petitioner was functioning when she attempted to represent her client by properly inquiring about whether Judge Barbara was biased. In the end, it was determined he was biased. The outcome of the contempt proceedings would *not* have been the same if an impartial judge had heard the matter.

evaded review, by both the state and federal courts. If the rule of law relied on by the federal district and appellate court is allowed to stand, a person in petitioner's place can *never* gain review of a serious constitutional violation which has dramatically impacted her professional life. This fact is the central issue raised by this petition.

On March 31, 1997, petitioner filed a petition for habeas relief in federal court. The State challenged jurisdiction, and on November 18, 1997, the district court entered an order finding that petitioner was not "in custody," and dismissed the petition. On December 23, 1997, the district court entered an order certifying for review by the Tenth Circuit Court of Appeals three issues, including the constitutional issue regarding judicial bias and the "in custody" issue. On October 7, 1998, the Tenth Circuit issued an order affirming dismissal, addressing only the "in custody" issue.

REASONS THE WRIT SHOULD ISSUE

A. IT IS A DENIAL OF EQUAL PROTECTION TO DENY ACCESS TO FEDERAL COURTS THROUGH HABEAS REVIEW FOR THOSE PERSONS WHOSE CONSTITUTIONAL RIGHTS HAVE BEEN VIOLATED, SIMPLY BECAUSE THEY HAVE NOT BEEN IMPOSED JAIL TIME, WHILE THOSE WITH JAIL TIME IMPOSED ARE AFFORDED FULL REVIEW OF THEIR CONSTITUTIONAL ISSUES.

If a party can be denied access to federal court review of constitutional error which occurred in a criminal proceeding, simply because she was not imposed jail time, while a person with ten minutes of jail time can have full review, equal protection has

been denied.

Congress should not be able to place a restriction on the ability of an Article III court to review constitutional issues, particularly in the absence of any compelling or rational basis for doing so. *E.g., Ortwein v. Schwab*, 410 U.S. 656, 660, 93 S.Ct. 1172, 1175, 35 L.Ed.2d 572 (1973); *United States v. Kras*, 409 U.S. 434, 446, 93 S.Ct. 631, 638, 34 L.Ed.2d 626 (1973). The Equal Protection Clause prohibits granting some persons access to courts, while denying that same access to others. *E.g., Three Affiliated Tribes of the Fort Berthold Reservation v. Wold Engineering, P.C.*, 467 U.S. 138, 157, 104 S.Ct. 2267, 2279, 81 L.Ed.2d 113 (1984); *Meltzer v. C. Buck LeCraw & Company*, 402 U.S. 936, footnote 1, 91 S.Ct. 1624, footnote 1, 29 L.Ed.2d 130 (1971).

Refusal to entertain this petitioner's habeas lawsuit "gives rise to the substantial constitutional question posed by denial of access to the federal courts. Whether the Constitution permits Congress to forbid an Art. III court from reviewing constitutional challenge to administrative penalties is a question the Court has not addressed explicitly." *Jones v. United States*, 419 U.S. 907, 910, 95 S.Ct. 190, 192, 42 L.Ed.2d 150, Douglas, Justice, dissenting from denial of certiorari (1974). In *Jones*, a serviceman was denied habeas review because his sentence did not include incarceration. He sought to have constitutional challenges to his conviction reviewed by the federal court. "A determination of these claims by a federal court," Justice Douglas said, "is an indispensable safeguard of the constitutional rights of an accused . . . " 419 U.S., at 909; 95 S.Ct., at 191.

Jones was denied relief because he did not receive jail time. "The absence of confinement does not render the punishment trivial. Penalties not involving imprisonment – discharges, forfeitures, demotions – are frequently employed by military authorities, often with devastating effect upon the life and

livelihood of the affected serviceman." 419 U.S., at 910; 95 S.Ct., at 192-193. Quoting from *Kauffman v. Secretary of the Air Force*, 135 U.S.App.D.C. 1, 415 F.2d 991, 996 (1969), Justice Douglas continued:

> To hold that collateral review is contingent upon confinement in every case would arbitrarily condition the serviceman's access to civilian review of constitutional errors upon a factor unrelated to the gravity of the offense, the punishment, and the violations of the serviceman's rights.

Ibid.

Denying a United States citizen review by an Article III court of federal constitutional questions, as protection against an improper criminal conviction by the state, defeats the ultimate purpose for the formation and existence of federal courts. Indeed, a federal court that oversees and protects the federal constitutional rights of the citizenry is what distinguishes a group of states united into one nation from a group of states loosely associated. In other words, while the states have certain rights, at the same time by forming a union, we all agreed to be governed – and protected – by the federal Constitution, with the federal government providing the protection. The entire scheme of our constitutional form of government is defeated if one class of citizens – in this case those whose criminal penalty happens not to include jail time – can be deprived of that protection. That is precisely what has happened in this case. This petitioner has no place else to go for review or relief.

It has long been established that in a criminal matter the accused is entitled to an impartial fact finder. The failure to so provide amounts to foundational error, of the type that threatens to erode the entire criminal justice process. Under no circumstances has this Court permitted the government to let a

conviction stand which was given at the hands of a biased fact finder. Even if the evidence of guilt is enormous. That is because there is no manner of careful incision which can cut out the bias from the outcome.

This rule of law means *nothing* if a person who is the victim of its failure has no recourse to federal court. Further, to grant full review of the issue to a person who is punished by a jail term, while denying any review to a person whose punishment, no matter how devastating, happens not to include a jail term, is a denial of equal protection. There is no rational basis for such an outcome. The harm which federal courts protect against is the harm of denial of constitutional rights. That harm does not only result from jail time.

In this case, had petitioner been given a day in jail, that consequence would not have been nearly as severe as the one imposed instead. One day in jail could have been served, and been over with and done, without long term consequences. Instead, she was removed as lead counsel from a case with an important client who needed her.[4] She was also removed from practicing in the judicial district where she resides, pending payment of a substantial fine and half the court costs of a multi-day evidentiary hearing. She also had a cloud placed over her professional reputation, by a judge whom she has now demonstrated should not have been hearing the charge of

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[4] The complexity of the constitutional issues raised in the case from which petitioner was removed can be seen in this Court's Case No. 96-582. By virtue of a statutorily-mandated stay pending appeal of the contempt finding, petitioner was able to present a petition for writ of certiorari to this Court in that matter. The Court required a response from St. David's, and then denied the writ.

contempt.[5] This impact on petitioner's professional reputation and activities is far more serious than the impact one day in jail would have had. The restraints on her liberty interest in her professional reputation and pursuits, *e.g., Schware v. Board of Bar Examiners of the State of New Mexico*, 353 U.S. 232, 77 S.Ct. 752, 1 L.Ed.2d 796 (1957); *Meyer v. State of Nebraska*, 262 U.S. 390, 43 S.Ct. 625, 67 L.Ed. 1042 (1923), was far greater than a sentence of one day in jail would have been on her physical liberty.

Further, there is no compelling or rational basis for a distinction between jail time and a fine. This Court rejected such a distinction as a basis for denying access to indigent persons to an appeal by a rule which provided transcripts in felony cases only in *Mayer v. City of Chicago*, 404 U.S. 189, 92 S.Ct. 410, 30 L.Ed.2d 372 (1971). "The invidiousness of the discrimination that exists when criminal procedures are made available only to those who can pay is not erased by any differences in the sentences that may be imposed." 404 U.S., at 196; 92 S.Ct., at 416. Similarly, the unconstitutionality of a conviction rendered by a biased judge is no less unconstitutional by any difference in the sentence imposed.

> We add that even approaching the problem in the terms the city suggests hardly yields the answer the city tenders. The practical effects of conviction of even petty offenses of the kind involved here are not to be minimized. A fine may bear as heavily on an

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[5] In addition to the ruling that Judge Barbara should not have heard the contempt charges, in the underlying case he was removed as well. The Kansas Court of Appeals stopped short of finding Judge Barbara should have removed himself from the underlying case, but directed that the case be reassigned upon remand, after that court reviewed a preliminary injunction. See *St. David's v. Westboro Baptist Church*, 22 Kan.App.2d 537, 921 P.2d 821 (1996).

> indigent accused as forced confinement. The collateral consequences of conviction may be even more serious, as when (as was apparently a possibility in this case) the impecunious medical student finds himself barred from the practice of medicine because of a conviction he is unable to appeal for lack of funds . . .

Ibid. This Court has clearly stated that the nature of the punishment is not a justification for distinguishing between different groups of criminally accused for purposes of protecting constitutional rights. Thus, Congress has no compelling or rational basis for limiting review by Article III courts of constitutional issues in criminal proceedings merely by virtue of whether the accused is actually physically confined or not. (This issue is further compounded by the broad range of what lower courts count as "in custody.")

Resort to federal court review is the "first line of defense against constitutional violations," *Bounds v. Smith*, 430 U.S. 817, 828, 97 S.Ct. 1491, 1498, 52 L.Ed.2d 72 (1997), and habeas petitions are of fundamental importance to our constitutional scheme of things. Thus, denial of access to federal courts for habeas review – when no other avenue is available as in this case – should be done only in the face of the most compelling governmental purpose. No valid governmental purpose can be discerned, when the distinction is based solely on the nature of the punishment imposed.

It is a denial of equal protection to deny access to federal courts for review of constitutional issues to those who have been found guilty in criminal proceedings who received punishment other than incarceration. If petitioner is not afforded access to federal court to present her constitutional claims, she has no place else to go.

B. IT WAS ERROR FOR THE FEDERAL COURTS TO FIND THAT PETITIONER WAS NOT "IN CUSTODY," GIVEN THE SIGNIFICANT RESTRAINTS ON HER LIBERTY, INCLUDING HER PROFESSIONAL LIBERTY.

This Court has made it clear that "in custody" means more than being placed in physical restraints. Recognizing that the writ has been extended "beyond that which the most literal reading of the statute might require," this Court has said that what a petitioner must show is that she "has suffered substantial restraints not shared by the public generally." *Lehman v. Lycoming County Children's Services Agency*, 458 U.S. 502, 510, 102 S.Ct. 3231, 3236-3237, 73 L.Ed.2d 928 (1982). "History, usage, and precedent can leave no doubt that, besides physical imprisonment, there are other restraints on a man's liberty, restraints not shared by the public generally, which have been thought sufficient in the English-speaking world to support the issuance of habeas corpus." *Jones v. Cunningham*, 371 U.S. 236, 240, 83 S.Ct. 373, 376, 9 L.Ed.2d 285 (1962).

The federal appellate courts consistently hold that a fine or restitution – standing alone – is not an adequate basis for a finding that the petitioner is "in custody." *E.g.*, *Williamson v. Gregoire*, 151 F.3d 1180, 1183, (9th Cir. 1998), and cases cited there from the First, Second, Fifth, Sixth, Seventh and Ninth Circuits; *Duvallon v. Florida*, 691 F.2d 483 (11th Cir. 1982); *Russell v. City of Pierre, State of South Dakota*, 530 F.2d 791 (8th Cir. 1976); *Wright v. Bailey*, 544 F.2d 737 (4th Cir. 1976).[6]

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[6] The reasoning for not recognizing a fine or restitution as

Even so, this case is not a fine only case. Lower courts have granted habeas review in cases which did not involve incarceration or did not involve a fine or restitution only. In *Gornto v. McDougall*, 336 F.Supp. 1372 (S.D.Ga. 1972), the court found that where petitioner's twelve month sentence was suspended and she was fined $1,006.50, she was in constructive state custody and the court had jurisdiction to review her habeas claims. In *Richards v. Townsend*, 300 F.Supp. 529 (N.D.Calif. 1969), the court found that a sentence of probation was sufficient to place the petitioner "in custody" for habeas review.

Federal appellate courts have also found petitioners to be "in custody" in the absence of any incarceration. In *Barry v. Bergen County Probation Department*, 128 F.3d 152 (3d Cir. 1997), the court held that a sentence of 500 hours of community service rendered petitioner "in custody" for purposes of habeas relief. The community service was imposed in lieu of a fine of $85,000, and if petitioner failed to perform he would be fined, not imprisoned. The State argued this fact, plus petitioner's ability to choose the type of assignment and when he would perform the assignment, indicated petitioner was not "in custody." The Third Circuit said that was too narrow a reading, noting that this Court had held that "in custody" was no longer limited to physical custody. The impact on liberty was found in the fact that the state was exercising control over how the petitioner spent his time.

In *Dow v. Circuit Court of the First Circuit*, 995 F.2d 922 (9th Cir. 1993), the court held that a sentence which did not subject

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placing the petitioner "in custody," is the distinction between a property and a liberty interest. As discussed above, this Court has noted that a punishment involving money, such as a fine or restitution, can be equally devastating. Further, in light of the equal protection violation raised herein, petitioner submits that this is a distinction that is not warranted by the history, purpose or precedent regarding the habeas writ.

petitioner to any incarceration, but instead included a $250 fine, a ninety-day suspension of his driver's license, and fourteen hours of attendance at an alcohol rehabilitation program, was sufficient to cause petitioner to be "in custody." The finding rested on the restraint on liberty arising from petitioner's forced attendance in the alcohol rehabilitation program.[7]

In an unpublished decision, the Fourth Circuit held that where petitioner was placed on probation after failing to pay fines and perform community service, the petitioner was "in custody." In that case, no jail time was ever imposed or suspended. *McClenny v. Murray*, 33 F.3d 52, 1994 WL 465851 (4th Cir. (Va., 1994)).

These cases reflect that the circuits are in conflict. By the reasoning used by the Third, Fourth and Ninth Circuits, petitioner is "in custody." She has specific restraints on her professional liberty, and on whether she can or not appear in specific courtrooms as counsel.

The conflict and confusion between the Circuits arises from a tendency by the lower courts to narrowly define "liberty," focusing still on physical restraint. But if physical restraint is not the only form of restraint that can be imposed on liberty, this narrow reading is unfounded. Further, the framers intended

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The same Circuit ruled this year that a requirement that a convicted sex offender register under a state law was not sufficient to find petitioner was "in custody" for habeas review. In spite of the substantial impact of the registration requirements on the sex offender's daily existence, the Ninth Circuit distinguished these cases on the basis of the fact that the petitioner did not have to personally appear at the sheriff's office to register, since that could be done by mail. And the fact that "the law does not specify anyplace in Washington or anywhere else where Williamson may not go." *Williamson v. Gregoire, supra*, 151 F.3d 1180 (9th Cir. 1998).

liberty to be defined as broadly as life and the pursuit of happiness. Nothing justifies so narrow a reading of "liberty" when deciding whether restraints on liberty are significant enough to place a petitioner "in custody."

The only case cited by the Tenth Circuit in its holding was *Ginsberg v. Abrams*, 702 F.2d 48 (2d Cir. 1983). Ginsberg was convicted of perjury during testimony to a grand jury which was investigating his receipt of money while serving as a New York State Assemblyman. He was not removed from the bench, where he served as a family judge, or disbarred from practicing law, as part of his sentence. After he was indicted, he was suspended as a judge with pay. After his conviction he never returned to the bench because a state law had been passed which prohibited a person with a felony conviction from serving as a judge. *Ginsberg v. Purcell*, 51 N.Y.2d 272, 273, 414 N.E.2d 648, 649, 434 N.Y.S.2d 147, 148, *reversed*, 74 A.D.2d 561, 424 N.Y.S.2d 473 (1980). Also after his conviction he was subjected to disbarment, though later reinstated. *In the Matter of Ginsberg*, 106 A.D.2d 421, 483 N.Y.S.2d 645 (1984).

Thus, the restraints in *Ginsberg* which were offered to form "in custody" were all "collateral consequences" of the conviction, not part of the sentence itself. In this case, by contrast, petitioner's professional liberty was directly impaired and restrained as part of the sentence.[8] Thus, *Ginsberg* is not

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[8] Petitioner recognizes that this Court treats "collateral consequences" different from the actual sentence imposed. *E.g.*, *Spencer v. Kemna*, 523 U.S. 1, 118 S.Ct. 978, 140 L.Ed.2d 43 (1998); *Maleng v. Cook*, 490 U.S. 488, 109 S.Ct. 1923, 104 L.Ed.2d 540 (1989); *Carafas v. LaVallee*, 391 U.S. 234, 88 S.Ct. 1556, 20 L.Ed.2d 554 (1968).

The rule announced by the Court in these, and other, cases is that if a petitioner is "in custody" at the time his petition is filed, but

controlling and does not justify the outcome reached by the Tenth Circuit. Ironically, though the Tenth Circuit disregarded petitioner's citations to authorities regarding collateral consequences and mootness as not on point, the court relied exclusively on a "collateral consequences" case to deny petition relief.

Petitioner was imposed a sentence which placed significant restraints on her liberty, including whether she could freely come and go – in a specific case and in a judicial district – and including on her professional liberty. Petitioner's sentence involved significantly more than the substantial fine and court costs imposed. Existing precedents indicate that a significant restraint on liberty, even in the absence of any form of physical custody, is sufficient for a finding that the petitioner is "in custody." It was

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later falls out of custody, so to speak, while the case is pending, *so long as* there are "collateral consequences" remaining, the claim is not moot and may be heard.

If the only way a federal court can have proper jurisdiction at the outset of a habeas action is by the petitioner being "in custody," it is a little puzzling that something *different* could provide jurisdiction at some later point in the case. Under the general mootness doctrine, in some manner the *original* dispute or controversy must still be alive. If the only controversy that can *originally* provide jurisdiction is being "in custody," how can something *different* satisfy later?

Given the purpose of habeas relief, and in light of petitioner's equal protection argument, petitioner urges here reconsideration of this distinction. If there are demonstrable (not merely speculative) "collateral consequences" flowing from a criminal conviction, petitioner respectfully urges the Court to adopt a rule of law which would permit that petitioner to have his constitutional issues reviewed. That is, if "collateral consequences" are demonstrated and significant, they should serve as the basis for a finding that the petitioner is "in custody."

error to dismiss petitioner's lawsuit for lack of jurisdiction.

CONCLUSION

This petition presents an important constitutional question, e.g., whether it is a violation of equal protection to allow persons sentenced to jail time to gain habeas review of constitutional issues, while denying that same access to those sentenced with something other than jail time. This petition also presents issues on which federal appellate courts are divided, concerning the scope of "in custody" in the absence of incarceration. This petition also presents a case where the Tenth Circuit has departed from an accepted course of judicial proceeding by denying review in a case presenting substantial restraints on liberty for the wrong reasons.

This case involves an unmitigated violation of petitioner's constitutional right to be tried by an unbiased judge. Petitioner should have been afforded review of the constitutional issues raised by her petition. Given the nature of the punishment imposed, including significant liberty restraints, past precedents of this Court indicate that petitioner has satisfied the "in custody" requirement for habeas review.

Petitioner asked Judge Barbara not to hear this matter over four years ago. It took her nearly two and a half years to gain a ruling that Judge Barbara should not have heard the contempt charges. That finding was meaningless, however, in light of the Kansas Court of Appeals' ruling that the error of allowing a biased judge to hear a criminal contempt case was harmless. This is a fundamental constitutional error on the part of the state court.

Since the state court issued its ruling, petitioner has been

unable to secure review of the constitutional issue. This failure has been premised upon the notion that her penalty is comparable to a fine-only case, which is not supported in the record; and/or that her penalty is not serious enough to warrant habeas review, which is not supported in the record; and/or that in the absence of incarceration she is not eligible for habeas review. Yet other Circuits have afforded habeas review in cases where no incarceration was imposed, illustrating that the federal appellate courts are not in agreement on what constitutes "in custody," particularly in cases not involving incarceration.

It is a violation of equal protection to afford some persons access to federal courts to review constitutional issues arising out of criminal proceedings, while denying that access to others. Congress does not have the authority to limit the federal court's review of constitutional issues, particularly in the absence of any rational or compelling basis for doing so.

This Court has recognized that physical custody is not a requirement for habeas review. This Court has also recognized that the imposition of a fine, or other non-incarceration penalties, can be as burdensome as incarceration. There is no rational basis for distinguishing between cases that involve fines or other forms of punishment and cases that involve incarceration.

Past decisions of this Court suggest that any restraint on liberty is adequate to satisfy the "in custody" requirement for habeas review. Petitioner here was sentenced to more than a fine, including being removed from an important and complex constitutional case where she was lead counsel, and being disbarred from her home judicial district until she pays the fine or court costs. Further, the "collateral consequences" to this conviction are serious, and should themselves be considered as part of the basis for finding that petitioner is "in custody."

Petitioner should not be subjected to all of the serious

penalties that flowed from her conviction for criminal contempt, in light of the finding by the Kansas Court of Appeals that Judge Barbara was biased and should not have heard the case. As a matter of fact and law, the outcome would not have been a finding of guilt had petitioner been tried by an impartial judge. Petitioner is entitled to review of this issue, and to have relief from the defective conviction.

Respectfully submitted,

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Supreme Court, U.S.
FILED

981078 JAN 4 - 1999

No.

IN THE
Supreme Court of the United States
October Term, 1998

Margie J. Phelps.
Petitioner

vs.

Michael Barbara
Carla J. Stovall and
John Bork

ON PETITION FOR WRIT OF CERTIORARI TO THE TENTH CIRCUIT COURT OF APPEALS

APPENDIX TO: PETITION FOR WRIT OF CERTIORARI

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NOT DESIGNATED FOR PUBLICATION

No. 74,090

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

ST. DAVID'S EPISCOPAL CHURCH

v.

WESTBORO BAPTIST CHURCH, INC.

In the Matter of the Citation in Contempt of:

FRED W. PHELPS, SR., and
MARGIE J. PHELPS,
Appellants.

MEMORANDUM OPINION

Appeal from Shawnee District Court; MICHAEL A. BARBARA, retired judge, assigned. Opinion filed January 17, 1997. Affirmed in part and reversed in part.

Jonathan B. Phelps, of Phelps, Chartered, of Topeka, for appellant Fred W. Phelps, Sr.

Chris R. Davis, and *Fred Phelps, Jr.*, of Phelps,

Chartered, of Topeka, for appellant Margie J. Phelps.

John K. Bork, assistant attorney general, and *Carla J. Stovall,* attorney general, for appellee.

Before KNUDSON, P.J., MARQUARDT,J., and TIMOTHY E. BRAZIL, District Judge, assigned.

Per Curiam: Margie J. Phelps and Fred W. Phelps, Sr., appeal their respective contempt convictions and the punishments imposed by the trial court. We affirm Margie Phelps' conviction and reverse Fred Phelps' conviction.

In a recent decision of this court, *St. David's Episcopal Church v. Westboro Baptist Church, Inc.,* No. 73,928, unpublished opinion filed June 21, 1996, the underlying factual circumstances in the injunction action were detailed. We will only narrate the additional circumstances pertaining to the contempt proceeding.

St. David's Episcopal Church (St. David's) initiated

this litigation against the Westboro Baptist Church, Inc., (WBC) by seeking an injunction to prevent WBC from picketing St. David's. Fred Phelps is the pastor of WBC; his daughter Margie Phelps was legal counsel for WBC. Judge Michael Barbara, a retired district court judge and a law professor at Washburn Law School was assigned to hear the case.

On July 21, 1994, Judge Barbara entered a temporary restraining order (TRO) imposing limitations on WBC picketing at St. David's. On August 9, 1994, WBC's motion to set aside the TRO was considered by the trial court and denied.

On August 14, 1994, Fred Phelps broadcast what is referred to in the record as a sermon on a Topeka radio program known as the "Old School Baptist Hour." Fred Phelps narrated information that he claimed a third party had recently divulged to him about Judge Barbara. Based upon

the third-party information, Fred Phelps stated that Judge Barbara had acted immorally and unlawfully in his private life and in a manner that reflected upon his fitness to be a law professor.

On September 14, 1994, Margie Phelps filed a motion for a change of judge pursuant to K.S.A. 20-311d. Pursuant to this motion, Judge Barbara held a hearing on September 20, 1994, with counsel for St. David's and WBC. At this hearing, Margie Phelps presented Judge Barbara with a transcript of the sermon and had it marked as an exhibit for identification purposes. After reviewing the exhibit, Judge Barbara stated:

> "As to what's an attempt to be No. 7, I will tell counsel, this is contemptuous language against the Court. This has nothing to do -- assuming the truth of this matter, it has nothing to do with my ability to sit as a fair and impartial judge. And I warn counsel that if she persists in this No. 7, she may be facing some contempt proceedings herself since you are the one that is offering it, as well as if Revered Phelps is offering it. But, this has nothing to do whatsoever with my ability to sit as a judge in this case."

Judge Barbara went on to explain that the contents of the exhibit dealt with his personal life, attacked him personally, and constituted an effort to intimidate the court. After Margie Phelps withdrew the exhibit, she stated that her only reason for withdrawing the exhibit was that the court threatened her with contempt.

On September 15, 1994, Washburn and the Kansas Attorney General's Office received a fax under the Westboro Baptist Church letterhead that made derisive and disparaging comments through the printed word and graphic art about Judge Barbara.

On September 29, 1994, Judge Barbara filed affidavits and issued orders for both Fred Phelps and Margie Phelps to appear and show cause why they should not be held in contempt of court.

The affidavit regarding Fred Phelps alleged contumacious conduct by: (1) the publication and

dissemination of the fax, (2) submission of exhibit 7 at the hearing on September 20, 1994, and (3) the content of the radio broadcast on August 14, 1994.

The affidavit regarding Margie Phelps alleged contumacious conduct arising out of her conduct at the hearing on September 20, 1994, including the preparation and offering of exhibit 7.

The contempt proceedings extended over four days. Judge Barbara found Fred Phelps guilty of indirect criminal contempt and fined him $1,000 plus one-half the costs of the proceedings. The court also found Margie Phelps in direct criminal contempt, ordered her to be removed as counsel in the underlying litigation, and imposed a fine of $500 plus one-half the costs of the proceedings. In addition, the court prohibited her from practicing law in the Third Judicial District until the fine was paid in full.

On appeal, Fred Phelps and Margie Phelps have

raised 23 different issues. Because of the conclusions we reach, the discussion that follows will generally be limited only to the issues dispositive of the appeal.

Recusal of Judge

Fred Phelps and Margie Phelps contend that Judge Barbara should have recused himself from the contempt hearing because of his stated belief that their actions were a personal attack upon his character and integrity and were designed to drive him from the underlying litigation between St. David's and WBC.

On appeal, the issue is whether it was inappropriate for Judge Barbara to preside over the contempt proceedings and, if so, whether there has been a showing of actual bias or prejudice that would require setting aside the judgments.

> In deciding this issue we must consider "whether the charge of lack of impartiality is grounded on facts that would create reasonable doubt concerning the judge's impartiality, *not* in the mind of the judge himself, or even, necessarily, in the mind of the litigant filing the motion, but rather in

> the mind of a reasonable person with knowledge of all the circumstances." *State v. Logan*, 236 Kan. 79, 86, 689 P.2d 788 (1984).

We are also mindful that a party or his attorney should not be permitted to force recusal upon a trial judge as a result of unwarranted personal attacks, which are designed for no other purpose than to drive a judge from the case. See *Mayberry v. Pennsylvania*, 400 U.S. 455, 27 L.Ed.2d 532, 91 S.Ct. 499 (1971).

The Code of Judicial Conduct provides that a judge should recuse if his or her impartiality might reasonably be questioned; *e.g.*, "[if the judge] has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding." Rule 601, Canon 3C(1)(a)(1996 Kan.Ct.R.Annot. 394); see Rule 601A, Canon 3E(1)(a).

The United States Supreme Court and the Kansas Supreme Court have considered the issue of recusal in

contempt proceedings. In *Ungar v. Sarafite*, 376 U.S. 575, 11 L.Ed2d 921, 84 S.Ct. 841, *reh. denied* 377 U.S. (1964), an attorney, who had been called to the stand as a witness for the prosecution, refused to answer questions and accused the trial court of treating him unfairly and improperly in ruling on the evidence. At the end of the underlying criminal proceedings, the court held a contempt hearing and found the attorney guilty of contempt.

On appeal, the attorney argued that he was denied a fair hearing because his contemptuous remarks were a personal attack on the judge, which necessarily biased the judge and required his recusal. The Supreme Court disagreed and stated: "We cannot assume that judges are so irascible and sensitive that they cannot fairly and impartially deal with resistance to their authority or with highly charged arguments about the soundness of their decisions." 376 U.S. at 584. The Court further stated that the record did not

leave it "with an abiding impression that the trial judge permitted himself to become personally embroiled" with the attorney. 376 U.S. at 585. The Court noted that the judge had not proceeded summarily but had given the parties notice and an opportunity for a hearing which was "conducted dispassionately and with a decorum befitting a judicial proceeding." 376 U.S. at 588. The court held that the trial court had not erred by failing to recuse itself and stated that it could not "say there was bias, or such a likelihood of bias or an appearance of bias that the judge was unable to hold the balance between vindicating the interests of the court and the interest of the accused." 376 U.S. at 588.

In *Mayberry*, the defendant in the underlying criminal action acted as his own attorney. During the trial, the defendant made numerous insulting and vulgar remarks to the trial judge. After the guilty verdicts had been returned

by the jury, and prior to sentencing, the judge found the defendant guilty of 11 counts of criminal contempt. The Supreme Court found that where a trial court does not act summarily, "it is generally wise where the marks of the unseemly conduct have left personal stings to ask a fellow judge to take his place." 400 U.S. at 464. The Court noted that "[a]t times a judge [may] not [have] been the image of 'the impersonal authority of law'...but [may] become so 'personally embroiled' with a lawyer in the trial as to make the judge unfit to sit in judgment on the contempt charge." 400 U.S. at 465.

In *State v Pondexter*, 225 Kan. 425, 590 P.2d 1074 (1979), Pondexter, a codefendant in a criminal case, who was sitting in the spectator section of the courtroom, became visibly upset and was removed. Outside the courtroom, he made threats against the judge and others; the judge was informed of the threats. Eventually returning to the

courtroom, Pondexter refused to leave when directed to do so by a security officer. After a scuffle, Pondexter was arrested. Later in the day, a contempt hearing was conducted, and Pondexter was found guilty of criminal contempt.

On appeal, Pondexter argued that the trial court should have recused itself from the contempt proceedings. Citing *Mayberry* and *Ungar*, the court held that the trial court did not err in failing to recuse itself. The court stated that when the conduct of the "contemner [is] not such as to constitute an insult to the judge personally or attack his judicial integrity, it may be proper for that judge to give notice, afford full opportunity for a hearing, and conduct a judicial hearing dispassionately and with fitting decorum. When this has been accomplished, the contemner's due process rights have been adequately protected regardless of which judge presided at the contempt hearing." 225 Kan. at

433-34.

All three of the above case are helpful; however, *Mayberry* is most instructive and contains reasoning that we believe is applicable to the case at hand. There is no doubt that Judge Barbara found the actions of Fred Phelps and Margie Phelps to be an assault upon his character and integrity. Referring to the transcript of Fred Phelps' sermon, which Margie Phelps had marked for identification purposes as exhibit 2 (State's exhibit 7 at trial), Judge Barbara, among his detailed findings and conclusions, stated:

> "1. Exhibit Number 2 contains baseless and scurrilous and offensive *personal charges* against the Court and *the judge in particular.*
>
> "2. Said exhibit *impugns the integrity of the Judge*, amounting to disrespect for the judicial dignity of the court and the judicial system in general.
>
> "3. The only purpose for offering state's Exhibit Number 2 was to intimidate and embarrass or coerce the Court, intending to force the Court to recuse itself.
>
> "4. Where an exhibit presented to the Court contains

> *scandalous, scurrilous and defamatory matters,* such filing constitutes contempt, and any allegations whether true or false are so immaterial and irrelevant as to have no proper place in any pleading, and the filing thereof constitutes an abuse of process and is contemptuous....
>
> ....
>
> "6. An intent to coerce a judge in the decision making process by a *personal attack* on the Court constitutes contempt." (Emphasis added.)

We have read State's exhibit 7. Without question, the exhibit constitutes a direct assault upon Judge Barbara's integrity and character as an individual and questions whether he is the sort of person who should be a Washburn Law School professor. Thus, this case is distinguishable from *Ungar*, the Supreme Court held that assuming there might be situations where "criticisms of judicial conduct...are so personal and so probably productive of bias that the judge must disqualify himself to avoid being the judge in his own case," Ungar's remarks to the judge were not that egregious. 376 U.S. at 583.

We readily acknowledge that Judge Barbara exhibited appropriate judicial demeanor and temperament during the exchange with Margie Phelps at the recusal hearing on September 20, 1994, and thereafter in the contempt trial of Fred Phelps and Margie Phelps. But that is not the issue. As was noted both in *Mayberry* and *Pondexter*, if the conduct of the contemner constitutes a highly personal attack on the trial judge, it is problematical for that judge as accuser to also preside as a judicial officer in the subsequent criminal contempt trial without giving an appearance of impropriety. We conclude that Judge Barbara should have recused.

We next consider whether prejudice to the substantial rights of either Fred Phelps or Margie Phelps has been shown. Margie Phelps' questionable conduct and actions were in court and are of record. Likewise, the statements and actions of Judge Barbara are also of record. We

conclude from the record that Margie Phelps' actions did constitute direct criminal contempt of court. Her attempt to introduce State's exhibit 7 at the hearing to disqualify the trial judge was inexcusable. The exhibit had nothing whatsoever to do with possible judicial bias or prejudice. judge Barbara was absolutely correct--the exhibit was intended to embarrass and humiliate the court and drive the judge from the case. No judge would countenance such conduct. Our review of the proceedings persuades us that Margie Phelps was afforded a full and fair hearing by Judge Barbara. Her conviction was overwhelmingly supported by the evidence, and the punishment imposed was very reasonable and well within the exercise of reasonable judicial discretion. Margie Phelps has failed to demonstrate prejudicial error.

The contempt proceeding against Fred Phelps is factually and legally distinguishable from Margie Phelps'.

His guilt or innocence depended upon issues of fact that had to be resolved by Judge Barbara as trier of fact. Unlike our review of Margie Phelps' conviction, we are not able to make a similar objective assessment regarding Fred Phelps's conduct and actions. Thus, we hesitate to conclude, as a matter of law, that failure of the trial judge to recuse was harmless error.

Jurisdiction

Phelps contends that the trial court lacked jurisdiction because (1) he was not a party to the action and (2) there was no court order that he was accused of violating.

We are not aware of any legal requirement that a person found in criminal contempt must be a party to the underlying action. There is no question that a person who is not a party may be found in direct contempt. See *State v. Pondexter*, 225 Kan. 425, 590 P.2d 1074 (1979). The question thus becomes whether a person who is not a party

may be held in indirect contempt of court.

In *Electronic Realty Associates, Inc. v. Gomez*, 18 Kan.App.2d 122, 125-26, 848 P.2d 458 (1993), this court stated that "[c]riminal contempt is intended to punish conduct that is 'in disrespect of a court or its processes, *or which obstructs the administration of justice.*" [Citation omitted.] A criminal contempt is 'conduct directed against the dignity and authority of a court'...." Certainly a person who is not a party has the potential to cause the court disrespect or to obstruct the administration of justice. See *Craig v. Harney*, 331 U.S. 367, 376, 91 L.Ed. 1546, 67 S.Ct. 1249 (1947); *Pennekamp v. Florida*, 328 U.S. 331, 90 L.Ed. 1295, 66 S.Ct. 1029 (1946); and *Bridges v. California*, 314 U.S. 252, 62 L.Ed. 192, 86 S.Ct. 190 (1941). We conclude it is within the inherent power of a constitutional court to subject any individual, whether a party or not, to contempt proceedings for obstructing the

administration of justice.

A very similar argument can be made regarding the lack of an underlying order upon which the contempt proceedings are predicated. Pointing to K.S.A. 20-1201, Fred Phelps contends that a court's contempt powers are statutorily limited. K.S.A. 20-1201 states: "[C]ontempts of court are divided into two classes, direct and indirect, and shall be proceeded against only as hereinafter prescribed." Referring to K.S.A. 20-1204a, Fred Phelps amplifies this argument. K.S.A. 20-1204a addresses the procedures to be followed for indirect contempt and states, in material part:

> "(a) When an order in a civil action has been entered, the court that rendered the same may order a person alleged to be guilty of indirect contempt of such order to appear and show cause why such person should not be held in contempt if there is filed a motion requesting an order to appear and show cause which is accompanied by an affidavit specifically setting forth the facts constituting the alleged violation.
>
> ....

> "(d) The provisions of this section shall apply to both criminal and civil contempts, but in the case of a criminal contempt the court on its own motion may cause the motion and affidavit provided for in subsection (a) to be filed."

Fred Phelps' construction of the above statutes ignores the circumstance of contemptuous conduct designed to obstruct the administration of justice which does not take place directly in front of a judge, occur in criminal actions, or violate an existing order. Such a construction is not reasonable. "[T]he legislature is presumed to intend that a statute be given a reasonable construction, so as to avoid unreasonable or absurd results." *Todd v. Kelly*, 251 Kan. 512, 520, 837 P.2d 381 (1992).

We hold that the procedural requirements of K.S.A. 20-1204a are mandatory, but that the legislature did not intend that the statute limit the inherent power of a constitutional court to punish for contempt, regardless of whether there existed an underlying court order.

Finally, we note that it appears somewhat disingenuous for Fred Phelps to assert that he is not a party in the underlying litigation. He is the pastor of WBC and its spiritual leader. Under such circumstances, he acts as an agent for the church and is subject to the contempt powers of the court as a party with pending litigation before the court.

Fred Phelps further contends that the trial court failed to comply with the requirements of K.S.A. 20-1204a(a) and consequently lacked jurisdiction to proceed against him. We agree.

K.S.A. 20-1204a(a) provides for indirect contempt proceedings only "if there is filed a motion requesting an order to appear and show cause which is accompanied by an affidavit specifically setting forth the facts constituting the alleged violation." In this proceeding, only an affidavit was signed by Judge Barbara; no motion was filed.

"Contempt proceedings founded in statute must

follow the prescribed procedures and are to be strictly construed against the movant. Only the accused may waive these statutory requirements." *In re Seelke*, 235 Kan. 468, Syl ¶ 1, 680 P.2d 288 (1984).

Noncompliance with K.S.A. 20-1204a(a) is jurisdictional unless waived by the accused. Fred Phelps did not waive the requirement that a motion be filed. The trial court lacked jurisdiction.

Statutory Immunity

Citing K.S.A. 20-311e, Fred Phelps and Margie Phelps contend that they are not subject to contempt for their actions.

K.S.A. 20-311e provides: "No judge or court shall punish for contempt anyone making, filing or presenting the affidavit provided for by K.S.A. 20-311d." In addition, Fred Phelps argues that he is protected by this statute because the affidavit and order to show cause alleges that all

of his conduct was designed to obtain the recusal of the trial judge.

Interpretation of a statute is a question of law, and this court's scope of review is unlimited. *Foulk v. Colonial Terrace*, 20 KanApp.2d 277, Syl. ¶ 1, 887 P.2d 140 (1994), *rev. denied* 257 Kan. 1091 (1995).

Fred Phelps and Margie Phelps' contention is without merit. The record demonstrates that the trial court did not file contempt proceedings because they filed a motion for a change of judge. The court stated that the reason for the contempt citations was that Fred Phelps and Margie Phelps had attempted to intimidate, embarrass, or coerce the court into recusing itself.

K.S.A. 20-311e is intended to protect parties from arbitrary action by a judge after a party has filed a motion requesting recusal. The statute does not prohibit a judge from bringing a contempt action against a party based upon

wholly inappropriate conduct or scurrilous accusations that have no bearing upon the pending litigation.

The Fine Imposed

Margie Phelps claims that the trial court imposed excessive fines. Our standard of review is to ascertain whether the trial court abused its discretion. See *State v. Hunt*, 257 Kan. 388, 402, 894 P.2d 178 (1995).

Margie Phelps was filed $500 and ordered to pay one-half of the court costs for the contempt proceeding. We conclude from a review of the record that the fine was commensurate with the contumacious conduct of Margie Phelps and well within the judicial discretion afforded the trial court.

Other Issues Raised

We have considered all of the other issues raised by Margie Phelps and conclude that none of them constitute reversible error.

For the above reasons, we affirm the conviction of Margie Phelps and the punishment imposed; we reverse the conviction of Fred Phelps.

B. Order of the Kansas Court of Appeals denying Motion for Rehearing dated February 12, 1997

COURT OF APPEALS ORDER
DISTRICT CASE NO. 94CV697

IN THE COURT OF APPEALS

OF THE STATE OF KANSAS

CHRIS R. DAVIS
PHELPS CHARTERED
1414 S TOPEKA BLVD
P O BOX 1886
TOPEKA KS 66601-1886

ST. DAVID'S EPISCOPAL CHURCH
V NO. 95-74090-A
WESTBORO BAPTIST CHURCH, INC.

IN THE MATTER OF THE CITATION IN
CONTEMPT OF:
FRED W. PHELPS AND
MARGIE J. PHELPS, APPELLANTS.

YOU ARE HEREBY NOTIFIED OF THE FOLLOWING ACTION TAKEN BY THE COURT:

APPELLANT'S MOTION FOR REHEARING OR MODIFICATION WITH SUGGESTIONS FOR REHEARING EN BANC.
DENIED.

DATE: 02/12/97.

CAROL G. GREEN
CLERK

C. Order of the Kansas Supreme Court denying Petition for Review dated March 19, 1997

SUPREME COURT ORDER

DISTRICT CASE NO. 94CV697

IN THE SUPREME COURT

OF THE STATE OF KANSAS

JONATHAN B PHELPS
PHELPS CHARTERED
P O BOX 1886
TOPEKA KS 66601-1886

ST. DAVID'S EPISCOPAL CHURCH
V NO. 95-74090-AS
WESTBORO BAPTIST CHURCH, INC.

IN THE MATTER OF THE CITATION IN
CONTEMPT OF:
FRED W. PHELPS AND
MARGIE J. PHELPS, APPELLANTS.

YOU ARE HEREBY NOTIFIED OF THE FOLLOWING ACTION TAKEN BY THE COURT:

PETITION FOR REVIEW OF MARGIE J. PHELPS.
DENIED.
ADDITIONAL AUTHORITIES NOTED.

DATE: 03/19/97.

CAROL G. GREEN
CLERK

D. Order of the federal district court dismissing habeas petition dated November 18, 1997

FILED
U.S. District Court
District of Kansas
97 Nov 18 PM 2:50
Ralph L. DeLoach
Clerk
BY /s/ C. Barnthson, Deputy
AT KANSAS CITY, KS

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

MARGIE J. PHELPS,	)
	)
Petitioner,	)
vs.	) CIVIL ACTION
	) No. 97-3110-GTV
HONORABLE MICHAEL BARBARA, CARLA J. STOVALL, and JOHN BORK,	)
	)
Respondents.	)

MEMORANDUM AND ORDER

This case is before the court on petitioner's habeas corpus petition (Doc. 1) filed pursuant to 28 U.S.C. § 2254. Petitioner seeks the dismissal or reversal of a finding of criminal contempt. In the alternative, petitioner seeks the same relief under 42 U.S.C. §§ 1983 and 1988. For the reasons set

forth below, the petition is dismissed.

I. Background

On June 13, 1994, St. David's Episcopal Church, located in Topeka, Kansas, filed a civil action to limit members of the Westboro Baptist church from harassing or assaulting members or visitors of St. David's as they entered the church. Petitioner served as Westboro Baptist Church's attorney in this matter. Judge Michael Barbara, a retired district court judge and a law professor, was assigned to hear the case. On July 21, 1994, Judge Barbara entered a temporary restraining order imposing limitations on picketing at St. David's by Westboro Baptist Church members.

On August 14, 1994, Fred W. Phelps, Sr., petitioner's father made a statement on a Topeka radio program known as the "Old School Baptist Hour." During this broadcast, Mr. Phelps stated that Judge Barbara had acted immorally and unlawfully in his private life and in a manner that reflected on

his fitness to be a law professor.

On September 14, 1994, petitioner filed a motion for a change of judge pursuant to K.S.A. 20-311d. Judge Barbara held a hearing on this motion on September 20, 1994. During the hearing, petitioner presented Judge Barbara with a transcript of Mr. Phelps' sermon and had it marked as an exhibit for identification purposes. After reviewing the exhibit, Judge Barbara stated that the exhibit contained contemptuous language and that it was irrelevant to his ability to sit as a fair and impartial judge. Further, he told petitioner that if she persisted in offering the exhibit, she might face contempt proceedings. Petitioner withdrew the exhibit.

As a result of petitioner's actions, Judge Barbara issued an order directing petitioner to show cause why she should not be held in contempt. Following a hearing in the contempt proceedings, Judge Barbara found petitioner in direct criminal contempt and ordered her to be removed as counsel in the

underlying litigation and imposed a fine of $500 plus one-half the costs of the proceedings. In addition, the court prohibited her from practicing law in the Third Judicial District until the fine was paid.

On January 17, 1997, the Kansas Court of Appeals upheld petitioner's conviction of direct criminal contempt. Petitioner's motion for rehearing or modification with suggestion for rehearing en banc was denied by the Kansas Court of Appeals on February 12, 1997. On March 19, 1997, the Supreme Court of the State of Kansas denied petitioner's motion for review. Petitioner filed her petition for a writ of habeas corpus in this court on March 31, 1997.

II. Discussion

Prior to deciding the merits of a habeas petition, the court must first determine whether an evidentiary hearing is required. See Rule 8(a) Governing § 2254 Cases in the United States District Courts. The court finds that the papers filed by

the parties and the state court record are sufficient to resolve the case. Accordingly, the court finds that no evidentiary hearing is required to decide petitioner's claims.

The federal habeas corpus statute, 28 U.S.C. § 2254, gives federal courts jurisdiction to entertain habeas corpus petitions filed by individuals who are "in custody" or subject to future custody pursuant to a state court judgment. See Rule 2 Governing § 2254 Cases in the United States District Courts. Historically, habeas corpus was appropriate only in those situations in which petitioner's claim would, if upheld, result in an immediate release from a present custody. See McNally v. Hill, 293 U.S. 131 (1934). However, "in custody" now includes a person on parole, Jones v. Cunningham, 371 U.S. 236 (1963), at large on his own recognizance but under several conditions pending execution of his sentence, Hensley v. Municipal Court, 411 U.S. 345 (1973), and even persons unconditionally released from prison subsequent to filing of

their petition. Carafas v. LaValle, 391 U.S. 234 (1968). Despite this more liberal application of habeas corpus, the Supreme Court has recognized that "[t]he custody requirement of habeas corpus statute is designed to preserve the writ of habeas corpus as a remedy for severe restrains on individual liberty" Hensley, 411 U.S. at 351.

A. "In Custody" Requirement

Plaintiff argues that she satisfies the "in custody" requirement of § 2254 for the following reasons: (1) she is subject to the terms and conditions of an appearance bond; (2) she is barred from practicing law in the Third Judicial District until she pays the $500 fine; and (3) she is unconditionally barred from appearing as WBC's counsel in the St. David's case. Petitioner's arguments do not entitle her to the relief sought in this case.

First, it does not appear from the record before the court that petitioner is under the obligation of an appearance

bond. Attached to Petitioner's Traverse is Exhibit 1 labeled, "Copy of Bond Required by Respondent Barbara." However, the court concludes that petitioner's exhibit is not a bond. It contains no promise to appear. Rather, it is a Qualification of Surety reflecting petitioner's assets, debts, and obligations. Although this document notes that petitioner is a surety on a bond for Fred W. Phelps for $5,000.00, neither the Qualification of Surety nor the pre-existing surety agreement creates any conditions or obligations on petitioner relevant to this habeas petition.

Second, the $500 fine and any collateral consequence resulting from nonpayment of the fine do not amount to "custody" for purposes of a habeas petition. Following Hensley, the Fifth, Seventh, and Ninth Circuits have held that a fine-only conviction is not considered a sufficient restraint on individual liberty to meet the "in custody" requirement of the habeas corpus statute. See Dremann v. Francis, 828 F.2d 6,7

(9th Cir. 1987); Hanson v. Circuit Court, 591 F.2d 404, 407 (7th Cir. 1979); Edmunds v. Won Bae Chang, 509 F.2d 39, 41 (5th Cir. 1975). Furthermore, "the ordinary collateral consequences or civil disabilities flowing from a fine-only conviction, although they may be restraints on liberty, are not severe enough to put the convicted person in custody within the meaning of the habeas corpus statute." Hanson, 591 F.2d at 407. In Dremann and Hanson, the petitioner faced incarceration upon nonpayment; however, those courts found that potential incarceration was insufficient to meet the "in custody" requirement. Dremann, 828 F.2d at 7; Hanson, 591 F.2d at 407. It is this court's conclusion that the prohibition from practicing law in the Third Judicial District until the fine is paid, does not satisfy the custody requirement of § 2254.

Finally, petitioner claims that she is "in custody" because she is unconditionally barred from acting as Westboro Baptist Church's counsel in the St. David's case. Although

this restraint is more than a collateral consequence flowing from a fine-only conviction, it does not amount to a "severe restraint on individual liberty." See Hensley, 411 U.S. at 351. Petitioner's conviction denies her the right to act as counsel for one case. Regardless of the subjective importance of this case to petitioner, this restraint is not objectively severe enough to allow the court to take jurisdiction under § 2254. Moreover, the court can find no decision by the Supreme Court or this circuit which would allow the court to take habeas corpus jurisdiction under § 2254 when the petitioner is not suffering a present or future custodial sentence. The court concludes petitioner is neither "in custody" nor subject to future custody for the purpose of federal habeas review. The court denies relief under 28 U.S.C. § 2254.

B. Relief Under Sections 1983 and 1988

Petitioner's alternative position is that, if the court finds that it lacks jurisdiction to hear the petition sounding in habeas

corpus, the petition nevertheless alleges a valid claim under sections 1983 and 1988. In her petition, petitioner requests that the court, pursuant to sections 1983 and 1988, "provide such further and additional relief as is appropriate to fully protect her constitutional rights herein enumerated, and award her cost and fees of this action." This request is denied.

Petitioner is, in essence, attempting to use sections 1983 and 1988 to collaterally attack the state court judgment of conviction. The Supreme Court has held that habeas corpus provides the exclusive federal remedy for prisoners attacking the fact or duration of their confinement. Preiser v. Rodriquez, 411 U.S. 475, 477 (1973). "Consequently, it would not permit a section 1983 attack in an action in which habeas would lie." Hanson, 591 F.2d at 409.

> Stripped to the bone, the plaintiff's action under § 1983 is little more than a habeas corpus action without a custody requirement. We do not believe that § 1983 was meant to be a substitute for habeas corpus when there is not custody. Under 28 U.S.C. § 2254, we have authority to

> grant habeas corpus relief to persons in custody pursuant to judgments of state courts. This is the Great Writ, and we endeavor to make it available to those suffering under unconstitutional imprisonment. We have, however, refused to extend habeas corpus relief to those not in custody. Under his theory of § 1983, the appellant would have us sit in perpetual review of all criminal decisions. We will not make the appellant's § 1983 action the greater writ by avoiding the custody requirement of § 2254 indirectly while refusing to extend the custody requirement directly.

Hanson, 591 F.2d at 409; Cavett v. Ellis, 578 F.2d 567, 569 (5th Cir. 1978). Therefore, the court concludes that petitioner has failed to state a cause of action under sections 1983 and 1988.

IT IS, THEREFORE, BY THE COURT ORDERED that petitioner's habeas corpus petition (Doc. 1) is dismissed.

The clerk shall mail copies of this order to counsel of record.

IT IS SO ORDERED.

Dated at Kansas City, Kansas this 18 day of November 1997.

/s/ G.T. Van Bebber
G.T. VAN BEBBER
United States District Judge

E. Order of the federal district court certifying issues for appeal dated December 23, 1997

FILED
U.S. DISTRICT COURT
DISTRICT OF KANSAS

97 DEC 23 PM 1:57

RALPH L. DELOACH
CLERK

BY:/S/C. BarnihsonDEPUTY
AT KANSAS CITY, KS.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

MARGIE J. PHELPS, Petitioner, vs. HONORABLE MICHAEL BARBARA, CARLA J. STOVALL, and JOHN BORK, Respondents.	)	CIVIL ACTION No. 97-3110-GTV

ORDER

This matter is before the court on petitioner's motion for the issuance of a certificate of appealability (Doc. 27).

Pursuant to 28 U.S.C. § 2253 (c)(2), a certificate of appealability may issue only if the petitioner makes a substantial showing of the denial of a constitutional right. The certificate of appealability shall identify specifically which issues meet this requirement.

Having examined the motion, the court finds the petitioner has made a sufficient showing in support of the following issues to warrant the issuance of a certificate of appealability:

1. Whether respondent Barbara's continued participation in the contempt proceedings against petitioner denied petitioner due process by failing to allow her an opportunity to proceed before an impartial judge?

2. Whether petitioner was denied due process by the respondent's failure to give notice that limitations on her practice of law might result from the contempt

proceedings?

3. Whether this court erred in finding petitioner was not "in custody"?

IT IS, THEREFORE, BY THE COURT ORDERED that petitioner's motion for the issuance of a certificate of appealability (Doc. 27) is granted.

Copies of this order shall be mailed to the parties and to the Clerk of the United States Court of Appeals for the Tenth Circuit.

IT IS SO ORDERED.

Dated at Kansas City, Kansas, this 23 day of December, 1997.

/s/ G.T. VAN BEBBER
G. T. VAN BEBBER
United States District Judge

F. Order of the Tenth Circuit Court of Appeals affirming dismissal of habeas petition dated October 7, 1998

FILED
UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

OCT 7 1998

PATRICK FISHER
CLERK

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

MARGIE J. PHELPS,

Petitioner-Appellant,

v.

No. 97-3385
(D.C. No. 97-CV-3110)
(D. Kan.)

MICHAEL BARBARA, in his official capacity as Judge of the Third Judicial District, Retired, Assigned; CARLA J. STOVALL, in her official capacity as Attorney General; JOHN BORK, in his official capacity as Assistant Attorney General and Assigned Special Prosecutor,

Respondents-Appellees.

ORDER AND JUDGMENT*

Before **ANDERSON, BARRETT,** and **EBEL,** Circuit Judges.

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* This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. The court generally disfavors the citation of orders and judgments; nevertheless, an order and judgment may be cited under the terms and conditions of 10th Cir. R. 36.3.

After examining the briefs and appellate record, this panel has determined unanimously that oral argument would not materially assist the determination of this appeal. See Fed. R. App. P. 34 (a); 10th Cir. R. 34.1.9. The case is therefore ordered submitted without oral argument.

Appellant Margie J. Phelps appeals from the district

court's order dismissing her petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254. In her petition, Ms. Phelps sought dismissal or reversal of a state court finding of criminal contempt. In the alternative, she sought the same relief under 42 U.S.C. §§ 1983 and 1988. The district court dismissed her claim for habeas relief on the basis that she had failed to satisfy the "in custody" requirement of § 2254. It further dismissed her §§ 1983 and 1988 claims finding that they constituted an impermissible collateral attack on her state court conviction.

The contempt finding against Ms. Phelps arose out of her conduct in St. David's Episcopal Church v. Westboro Baptist Church, No. 94-CV-967, a civil action filed on June 13, 1994 in the Third Judicial District Court, Shawnee County, Kansas. St. David's Episcopal Church (St. David's) filed the action seeking to prevent members of Westboro Baptist Church (Westboro) from harassing or assaulting members of St.

David's as they entered the church. Ms. Phelps served as attorney for Westboro. Judge Michael Barbara, a retired district court judge and a law professor, was assigned to hear the case.

On July 21, 1994, Judge Barbara entered a temporary restraining order imposing limitations on picketing by Westboro members at St. David's. On August 14, 1994, Fred W. Phelps, Sr., Ms. Phelps' father, stated on a Topeka radio program known as the "Old School Baptist Hour" that Judge Barbara had acted immorally and unlawfully in his private life and in a manner which reflected on his fitness to be a law professor.

On September 14, 1994, Ms. Phelps filed a motion for change of judge in the St. David's case. During a hearing on this motion on September 20, 1994, Ms. Phelps presented Judge Barbara with a transcript of Mr. Phelps' statement and had it marked as an exhibit for identification purposes. Judge

Barbara reviewed the exhibit, stated that it contained contemptuous language, and told Ms. Phelps that if she persisted in offering it, she might face contempt proceedings. She withdrew the exhibit.

Judge Barbara thereafter issued an order directing Ms. Phelps to show cause why she should not be held in contempt. Following a hearing in the contempt proceedings, Judge Barbara found her in direct criminal contempt. He ordered her to be removed as counsel in the St. David's case, fined her $500 plus one-half of the cost of proceedings, and prohibited her from practicing law in the Third Judicial District until the fine was paid. The Kansas Court of Appeals upheld the contempt conviction. The Kansas Supreme Court denied Ms. Phelps' motion for review.

Federal courts are empowered to grant habeas corpus relief to persons "in custody pursuant to the judgment of a State court," where that custody violates the Constitution or

laws or treaties of the United States. 28 U.S.C. § 2254. Although the statute refers to persons "in custody," a petitioner need not show that she is in actual, physical custody to obtain relief. See Maleng v. Cook, 490 U.S. 488, 491 (1989). It is sufficient to show that her conviction has made her subject to "severe restraints on [her] individual liberty." Hensley v. Municipal Court, 411 U.S. 345-351 (1973). Restraints are severe when they exceed those which the state imposes upon the public generally, see Jones v. Cunningham, 371 U.S. 236, 242-43 (1963), and when they "significantly restrain [the] petitioner's liberty to do those things which in this country free men are entitled to do," id. at 243.

Courts have generally held that a person sentenced only to a fine or restitution is not "in custody" within the meaning of the habeas statute. See Barry v. Bergen County Probation Dep't, 128 F.3d 152, 160 (3d Cir. 1997), cert. denied, 118 S.Ct. 1097 (1998); Edmunds v. Won Bae Chang, 509 F.2d 39,

41-42 (9th Cir. 1975). Ms. Phelps acknowledges these precedents, but argues that she faces consequences which exceed those present in the typical "fine only" case. She notes that as a result of her contempt conviction she faces the necessity of paying court costs, that she has been "disbarred" from the Third Judicial District of Kansas until the fine has been paid, that she has been "disbarred" from serving as attorney for Westboro in the St. David's case, that she has been required to post a bond, that she has had professional disciplinary proceedings instituted against her, and that she faces disciplinary action against her by her employer, the Kansas Department of Corrections Human Resources Division.

We agree with the district court that even in view of these additional consequences, Ms. Phelps is not "in custody" within the meaning of the habeas statute. First, she fails to show that court costs should be treated any differently than a fine. See Sandoval v. Municipal Court, No. 97-2098, 1998

WL 30240, at **1 (10th Cir. Jan. 9, 1998)(holding combination of fine and court costs did not constitute custody); Wright v. Bailey, 381 F. Supp. 924, 925 (W.D. Va. 1974), aff'd, 544 F.2d 737 (4th Cir. 1976). The restrictions on her ability to practice law and the risk of disciplinary action against her as an attorney do not constitute custody. See Ginsberg v. Abrams, 702 F.2d 48, 49 (2d Cir. 1983)(holding that petitioner's removal from the bench, loss of license to practice law, and disqualification from being licensed as a real estate broker or insurance agent was not custody).[1] Potential

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[1] Ms. Phelps cites a number of cases in which courts have held that a habeas petition was not moot because the petitioner remained subject to professional discipline. See, e.g., Watson v. Block, 102 F.3d 433, 437 n.3 (9th Cir. 1996), rev'd on other grounds, Pounders v. Watson, 117 S. Ct. 2359 (1997); Zal v. Steppe, 968 F.2d 924, 926 (9th Cir. 1992). We do not find these cases persuasive here. They concern the question of whether sufficient collateral consequences remained to present a live controversy after a sentence of incarceration had been served. Custody and collateral consequences are two separate issues. See Maleng, 490 U.S. at 491-92; see also United States v. Keane, 852 F.2d 199, 202 (7th Cir. 1988)("Civil disabilities (collateral consequences) may prevent

disciplinary action by her employer, similarly, does not constitute custody, even though it may "greatly [limit her] economic mobility." Id. Finally, Ms. Phelps does not contest the appellees' contention that the bond which she posted was a supersedeas bond for purposes of taking appeal, rather than a bond to secure her release from incarceration. The cases she cites in which prisoners released on bond have been considered "in custody" for habeas purposes are therefore inapplicable. Considering all of the alleged restrictions in combination, we conclude that the restraint on Ms. Phelps' liberty is insufficient to constitute custody for purposes of the habeas statute. The district court acted properly in dismissing her habeas claims.

We turn, therefore, to her alternative argument, that she is entitled to relief on her civil rights claims pursuant to 42 U.S.C. §§ 1983 and 1988. The district court also acted

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a challenge begun during imprisonment from becoming moot on release, but civil disabilities alone are not 'custody' authorizing collateral litigation." (citation omitted)).

properly in dismissing these claims.

> A federal district court does not have the authority to review final judgments of a state court in judicial proceedings; such review may be had only in the United States Supreme Court. Federal district courts do not have jurisdiction over challenges to state-court decisions in particular cases arising out of judicial proceedings even if those challenges allege that the state court's action was unconstitutional.

Van Sickle v. Holloway, 791 F.2d 1431, 1436 (10th Cir. 1986)(citations and quotations omitted).

Ms. Phelps' constitutional challenge is "inextricably intertwined" with the state court decision. See id. She acknowledges the force of this rule, but argues that her circumstances place her within one or more purported exceptions to it. We have reviewed her arguments concerning the alleged exceptions, and do not find them persuasive.

The judgement of the United States District Court for the District of Kansas is therefore AFFIRMED.

ENTERED FOR THE COURT
PER CURIAM

G. Order of the Tenth Circuit Court of Appeals denying petition for rehearing with suggestions for rehearing en banc dated November 6, 1998

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

MARGIE J. PHELPS,

Petitioner-Appellant,

v. No. 97-3385

MICHAEL BARBARA, in his official capacity as Judge of the Third Judicial District, Retired, Assigned; CARLA J. STOVALL, in her official capacity as Attorney General; JOHN BORK, in his official capacity as Assistant Attorney General and Assigned Special Prosecutor,

Respondents-Appellees.

ORDER

Filed November 6, 1998

Before **ANDERSON, BARRETT,** and **TACHA,** Circuit Judges.

Appellant's petition for rehearing is denied.

The suggestion for rehearing en banc was transmitted to all of the judges of the court who are in regular active service as required by Fed.R.App.P. 35. As no member of the panel and no judge in regular service on the court requested that the court be polled, the suggestion is also denied.

Entered for the Court
PATRICK FISHER, Clerk of Court

by: /s/ Amy Frazier
Deputy Clerk